

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARDRENUMBERING, AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board adopts an order to **amend** NR 400.02(64), 407.07(3)(b) and 407.12(1)(intro); and to **create** NR 406.075, 407.11(1)(e) and 407.12(1)(e) relating to changes to chs. NR 400, 406 and 407 for providing the interface of the state air permitting programs and establishing "state-only" provisions in construction permits.

AM-32-04a

Analysis Prepared by the Department of Natural Resources

Statutory Authority: ss. 227.11(2)(a), 285.11(1) and (6) and 285.67, Stats.

Statutes Interpreted: ss. 285.11(6), 285.61 and 285.67, Stats. The State Implementation Plan developed under s. 285.11(6), Stats. is revised.

Explanation of Agency Authority

Section 227.11(2)(a), Stats., gives agencies general rulemaking authority. Section 285.11(1), Stats., gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11(6), Stats., gives the Department the authority to develop a state implementation plan for the control of air pollution. Section 285.67, Stats., gives the Department the authority to promulgate rules establishing criteria and procedures for revising air pollution control permits.

Related Statute or Rule

These rules relate directly to regulations in chs. NR 406 and 407 for the permitting of activities that result in air emissions.

Plain Language Rule Analysis

On March 4, 2004, the United States Environmental Protection Agency (EPA) issued a Notice of Deficiency to the State of Wisconsin for matters concerning its operation permit program. EPA informed the State that conditions that are included in permits that are issued under ch. NR 406, Wis. Adm. Code must be considered to be federally enforceable, regardless of whether those conditions are included in Wisconsin's State Implementation Plan (SIP). Thus, all emission limitations and specific conditions that are contained within a construction permit are federally enforceable because there is no mechanism within the construction permit program to identify "state-only" requirements. These rule revisions will enable Wisconsin to identify a permit condition or emission limitation as a "state-only" requirement in a construction permit if the requirement has not been submitted to EPA for inclusion in the SIP, and thus is not intended to be federally enforceable, or if the requirement is not required by federal law. Examples of such requirements are those in ch. NR 445, Wis. Adm. Code.

EPA and the regulated community have raised issues in regard to the interface between construction and operation permits issued under chs. NR 406 and 407 respectively. Current

Wisconsin regulation requires the incorporation of facility modifications that have been approved in a construction permit into operation permits using significant operation permit revisions. To provide for a better interface between these programs, the proposed rule changes allow for projects that have been permitted under ch. NR 406 to be included into operation permits issued under ch. NR 407 using either administrative or minor revision processes. Administrative or minor revisions allow for limitations and conditions that had been approved in construction permits to be effective in operation permits in a more streamlined and efficient process than the significant revision approach. The proposed rule changes also revise the deadline for issuance of the operation permit to make it consistent with state statutes.

By reviewing and issuing construction permits using procedures that are substantially equivalent to those required for operation permit review, the Department may incorporate the changes approved under the construction permit into the operation permit using administrative revisions under the proposed rule change. Substantially equivalent procedures include the opportunity for public, neighboring state and EPA review and well as equivalent application and permit content requirements. The Department is currently required to use the significant permit revision process to revise an operation permit to incorporate conditions from a construction permit which has led to complexities in the interface between construction and operation permits. The proposed rule change allows the Department to issue the revision to the operation permit prior to construction being completed, resolving permit interface issues that have surfaced in regard to competing construction and operation permit requirements as well as compliance monitoring and certification obligations. A substantially equivalent EPA review period includes a period in which EPA has the opportunity to review the proposed operation permit changes authorized by the construction permit approval. Unless EPA agrees to expedite its review period for a particular project, allowance for EPA review of the proposed permit for incorporation in to the operation permit using an administrative revision will result in additional time to issue the construction permit. As a result, the Department under these proposed rules will provide the facility with the option to choose whether an administrative revision process is used to incorporate construction permits into operation permits.

As an alternative to the use of administrative revisions, the Department is proposing rule changes that allow for the incorporation of minor modifications to facilities that have been approved in construction permits issued under ch. NR 406 in operation permits using a minor operation permit revision. Minor modifications are changes that are not required to obtain approval under the Prevention of Significant Deterioration or Nonattainment Area New Source Review Programs, per chs. NR 405 and 408 respectively. The minor revision process, like the administrative revision process, also requires an opportunity for EPA review of a proposed operation permit change at major sources, but the facility is allowed to incorporate the change into its method of operation prior to the operation permit change being approved. Thus, a proposed change to the operation permit can be made available to EPA following the issuance of the construction permit and the facility is not forced to delay implementation of operational changes that may be in conflict with their operation permit while EPA concludes its review of the proposed operation permit revision.

Federal Regulatory Analysis

Wisconsin currently conducts air permit reviews for new and modified sources under its construction permit program, authorized by chs. NR 405, 406 and 408, Wis. Adm. Code. This program has been fully approved by EPA into the Wisconsin State Implementation Plan (SIP).

EPA informed the State through a Notice of Deficiency issued on March 4, 2004, that all permit terms and conditions that originate in construction permits issued under SIP approved permit programs are considered to be federally enforceable because the program has no mechanism to declare the terms and conditions as state-only. EPA stated that the federally enforceable permit makes the term or condition federally enforceable even if the requirement has not been submitted to EPA for inclusion in the SIP, and thus is not intended to be federally enforceable, or if the requirement is not required by federal law since the program lacks necessary exclusionary components. Although EPA has yet to approve provisions for the exclusion of non-federally enforceable conditions in any State's Implementation Plan to date, EPA has informally allowed for the practice by other permitting authorities in several states.

When EPA promulgated rules to implement the provisions of Title V of the Clean Air Act, it included revisions processes for such permits. The revision processes EPA included were categorized as either Administrative, Minor or Significant. Within a August 31, 1995 Federal Register notice, EPA provided further interpretation of the processes for implementation of operation permit revisions, particularly as they can be used to include construction permit requirements into operation permits. EPA clarified that changes that occur at a facility and have been reviewed under a preconstruction permit program, such as those permits issued under ch. NR 405, 406 or 408, Wis. Adm. Code, can be incorporated into operation permits using a minor or administrative revision process, if the state's operation permit program allows for such revision processes to be utilized.

State Regulatory Analysis

Currently, all emission limitations and specific conditions that are contained within a construction permit are federally enforceable because there is no mechanism within the construction permit program to identify "state-only" requirements. These rule revisions will enable Wisconsin to identify a permit condition or emission limitation as a "state-only" requirement in a construction permit if the requirement has not been submitted to EPA for inclusion in the State Implementation Plan, and thus is not intended to be federally enforceable, or if the requirement is not required by federal law. Michigan has also established a similar provision in its permitting program to address this same issue, although EPA has yet to approve this change.

Wisconsin's operation permit program, which was based upon EPA operation permit regulations prior to August 31, 1995, requires changes at a facility that require a construction permit to be included in an operation permit using a significant permit revision process. The significant revision process has created situations where conflicting requirements can be applicable to an air pollution source following modifications. EPA recognized this matter and has created recommendations for States to revise their operation permit programs to utilize administrative and minor revision processes to incorporate facility changes that have been approved by construction permit programs into operation permits. Minnesota, Michigan, Illinois and Iowa have taken advantage of EPA's recommendations.

Summary of Factual Data

The proposed rule revisions have been developed to address issues raised within EPA's notice of deficiency issued to Wisconsin in regard to its operation permit program and to allow construction permit requirements to be incorporated into operation permits using more streamlined procedures.

Effect on Small Business

The rule revisions will be provided for a more streamlined air permitting program which will benefit small and large businesses alike by providing additional clarity as to which requirements they are required to meet and by clearly stating whether requirements are enforceable by state or federal government.

Anticipated Costs Incurred by the Private Sector

There are no additional costs anticipated to be incurred by the private sector as a result of these rule revisions.

Agency Contact Person

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SECTION 1. NR 400.02(64) is amended to read:

NR 400.02(64) "Federally enforceable" means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to chs. NR 440 and 447 to 449 and subch. III of ch. NR 446 and under sections 111 and 112 of the Act (42 USC 7411 and 7412), requirements within any applicable state implementation plan; and any permit requirements established pursuant to ch. NR 405, requirements in construction permits issued under ch. NR 406, 407, or 408 and requirements in operation permits issued pursuant to ch. NR 407 and title V of the Act, 409 or 411 except those limitations and conditions which are designated as not federally enforceable.

SECTION 2. NR 406.075 is created to read:

NR 406.075 Federally enforceable requirements. (1) Except as provided in sub. (2), all terms and conditions in a construction permit, including any provisions designed to limit a stationary source's potential to emit, are federally enforceable by the administrator under section 113 of the Act (42 USC 7413).

(2) Notwithstanding sub. (1), the department shall specifically designate as not federally

enforceable any terms and conditions included in the permit that are not required under the Act, under any of the federal regulations implementing the Act or under the state implementation plan.

SECTION 3. NR 407.07(3)(b) is amended to read:

NR 407.07(3) (b) Issue or deny the operation permit within 180 days after the application is considered to be complete or after the applicant submits to the department the results of all equipment testing and emission monitoring required under the construction permit, whichever is later.

SECTION 4. NR 407.11(1)(e) is created to read:

NR 407.11(1)(e) Revision of an operation permit to include the requirements from a construction permit issued under ch. NR 405, 406 or 408, provided the procedural requirements of s. 285.62(1) to (7), Stats., are met during the issuance of the construction permit.

SECTION 5. NR 407.12(1)(intro.) is amended to read:

NR 407.12(1)(intro.) ELIGIBILITY. Any person holding an operation permit may submit a request to the department to revise the operation permit, to reflect a proposed change at the facility, using the minor permit revision procedures described in this section, provided ~~the proposed change is exempt from department review under chs. NR 405, 406 and 408 and~~ the proposed change meets all of the following criteria:

SECTION 6. NR 407.12(1)(e) is created to read:

NR 407.12(1)(e) The proposed change has been approved in a construction permit issued under ch. NR 406 or the proposed change is exempt from department review under chs. NR 405, 406 and 408.

SECTION 7. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 8. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on June 22, 2005.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)